

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL VINCENT PASCOCCIELLO and	:	CIVIL ACTION
CAROLYN PASCOCCIELLO	:	
	:	
v.	:	
	:	
INTERBORO SCHOOL DISTRICT and	:	
ROBERT J. CASTLE	:	NO. 05-5039

**ORDER - MEMORANDUM**

**AND NOW**, this        day of June, 2006, upon consideration of Defendants' Supplemental Motion to Dismiss Cross-Claims of Defendant Board of Education of Fayette County (Docket No. 28) and all documents filed in connection therewith, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.

**I.        PROCEDURAL AND FACTUAL BACKGROUND**

In 2004, Plaintiffs, Michael Vincent Pascocciello and his mother, Carolyn Pascocciello, filed a lawsuit in state court in West Virginia against Edgar Friedrichs, the principal at Michael's elementary school in Fayette County, West Virginia and the Board of Education of Fayette County ("Fayette"), alleging that Friedrichs sexually abused Michael and also caused him emotional distress when Friedrichs killed Michael's friend, Jeremy Bell, while they were on a camping trip with Friedrichs in 1997. Plaintiffs also sued the Interboro School District ("Interboro") and Robert J. Castle, a former principal at Prospect Park Elementary School because of their role in concealing acts of pedophilia Friedrichs had committed while teaching at Prospect Park Elementary School in 1973.

The case was removed to the United States District Court for the Southern District of West Virginia. Shortly thereafter, in October 2004, Fayette filed cross-claims against Defendants seeking

indemnification and/or contribution from Defendants in the event that Plaintiffs recovered from Fayette. Defendants successfully challenged personal jurisdiction in West Virginia and the West Virginia district court transferred all of Plaintiffs' claims against them, including Fayette's cross-claim against them, to this Court in 2005. Pascocciello v. Interboro, Civ. A. No. 5:04-1085, Order (S.D. W. Va. Dec. 14, 2005); Pascocciello v. Interboro, Civ. A. No. 5:04-1085, 2005 WL 2994296, at \*5 (S.D. W. Va. Nov. 8, 2005). Plaintiffs' other claims against Fayette and Friedrichs remained in the West Virginia district court ("the West Virginia lawsuit").

In December 2005, this Court ordered Plaintiffs to file a Third Amended Complaint. They did so on January 6, 2006. In the Third Amended Complaint ("the Complaint"), Plaintiffs allege that Defendants knew of Friedrichs's pedophilia but failed to report it. After Friedrichs stopped working at Prospect Park Elementary School, Castle wrote a reference letter for Friedrichs in September 1974; the letter failed to disclose Friedrichs's pedophilia and was relied upon by Fayette when it hired Friedrichs in 1975.<sup>1</sup> In addition, in September 1975, the superintendent of Interboro confirmed to Fayette that Friedrichs had worked at Interboro for nine years and two months. Plaintiffs maintain that Interboro should have disclosed Friedrichs's pedophilia in this correspondence.<sup>2</sup>

Based on the allegations in the Complaint, Plaintiffs advanced seven causes of action. Plaintiffs sought punitive and/or treble damages against Defendants in addition to compensatory damages, attorney's fees, costs and prejudgment interest. Defendants moved to dismiss the Complaint in January 2006. While this motion was pending, Fayette settled the West Virginia lawsuit with Plaintiffs; as part of this settlement, Fayette transferred its cross-claim against

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<sup>1</sup>A copy of Castle's letter is attached to the Complaint as an exhibit.

<sup>2</sup>A copy of this correspondence is attached to the Complaint as an exhibit.

Defendants to Plaintiffs. On April 7, 2006, after learning of the settlement, Defendants moved to dismiss the cross-claim. On April 18, 2006, Plaintiffs filed a notice of transfer of interest, informing the Court that, as part of the settlement with Plaintiffs, Fayette had transferred its cross-claim against Defendants to Plaintiffs. On May 1, 2006, Plaintiffs responded to Defendants motion to dismiss the cross-claim. On May 8, 2006, the Court filed a Memorandum and Order which dismissed all counts of the Complaint, except for counts 3 and 7 against Interboro, which allege violations of the constitutional right to bodily integrity. The Court also dismissed the claim for punitive damages against Interboro.

## **II. LEGAL STANDARD**

A Motion to Dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction may challenge the court's jurisdiction on either “factual” or “facial” grounds.<sup>3</sup> Turicentro, S.A. v. American Airlines Inc., 303 F.3d 293, 300 n.4 (3d Cir.2002). In considering a factual attack, “no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). By contrast, when determining facial attacks, e.g., attacks which contest the sufficiency of allegations of jurisdiction in the complaint, the court must accept as true the allegations set forth in the complaint. Turicentro, 303 F.3d at 300. On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the claimant bears the burden of showing that jurisdiction exists. Kehr Packages, Inc. v.

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<sup>3</sup>Defendants have not specified what subsection of Rule 12(b) they wish to proceed on; in their motion, however, they essentially argue that the cross-claim is moot, which is a question of subject matter jurisdiction. County of Morris v. Nationalist Movement, 273 F.3d 527, 533 (3d Cir. 2001). Thus, Defendants’ motion will be addressed under Rule12(b)(1).

Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.1991).

### III. DISCUSSION

Federal Rule of Civil Procedure 13(g) allows a party to state a cross-claim against a co-party.<sup>4</sup> Defendants have moved to dismiss the cross-claim Fayette stated against them on the ground that, because Fayette settled its lawsuit with Plaintiffs, it is no longer a party and, as a matter of law, it cannot be a cross-claimant. To support their argument, Defendants cite United States v. Thomas Steel Corp., 107 F. Supp. 418, 422 (N.D. Ohio 1952). In that case, the United States had sued Cold Metal Process Company (“Cold Metal”) and other defendants to compel the defendants to pay royalties owed to the United States. Id. at 419. Cold Metal had, in turn, filed a cross-claim against its licensees. Id. at 421. In the complex litigation which ensued, the United States wanted the court to dismiss its complaint against Cold Metal but allow Cold Metal to remain as a cross-claimant. Id. at 422. The court declined to afford this relief because it found that Rule 13(g) would not allow a cross-claim to be maintained by an entity which was no longer a party to the litigation. Id.

The decision in Thomas Steel is not consistent with Third Circuit precedent. The Third Circuit has held that, if a defendant has a cross-claim pending and the defendant is subsequently dismissed from the lawsuit for non-jurisdictional reasons, the defendant’s cross-claim is still viable

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<sup>4</sup>The rule provides:

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Fed. R. Civ. P. 13(g).

and may not be dismissed. Fairview Park Excavating Corp. v. Al Monzo Constr. Co. Inc., 560 F.2d 1122, 1125 (3d Cir. 1977); see also Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 823 F. Supp. 1188, 1190 (E.D. Pa. 1993).

Here, Fayette filed its cross-claim against Defendants in October 2004, when it was a party to the West Virginia lawsuit. While Fayette is no longer a party, it has ceased to be a party based on settlement, not a failure of jurisdiction. Therefore, under Third Circuit precedent, the fact that Fayette is no longer a party cannot justify dismissing the cross-claim against Defendants. Fairview Park Excavating Corp., 560 F.2d at 1125; see also Glaziers & Glassworkers Union Local 252 Annuity Fund, 823 F. Supp. at 1190. Because Defendants advance no other reason to dismiss the cross-claim, their Motion is denied.

BY THE COURT:

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John R. Padova, J.